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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PETER F. PAUL, Plaintiff and Respondent, v. GARY SMITH, Defendant and Appellant.	B213299 (Los Angeles County Super. Ct. No. BC304174)

APPEAL from an order of the Superior Court of Los Angeles County, Aurelio N. Muñoz, Judge. Affirmed.

Kenoff & Machtinger and Leonard S. Machtinger for Defendant and Appellant.

D. Colette Wilson for Plaintiff and Respondent.

Gary Smith, who had been hired by Peter F. Paul to produce the concert portion of a fundraising event Paul was organizing for former Senator Hillary Rodham Clinton (Senator Clinton), appeals from the trial court's order denying his special motion to strike under Code of Civil Procedure section 425.16[1] a fraud claim filed by Paul alleging Smith had misrepresented the fee he would charge for his services. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

1. *Paul's Fundraiser for Senator Clinton and His Plan To Hire President Clinton To Promote Paul's Companies*

In a lawsuit that originally included as defendants former President William Jefferson Clinton, Hillary Rodham Clinton for U.S. Senate Committee, Inc. (Clinton for Senate), David Rosen, the former national fundraiser for Senator Clinton's senatorial campaign, and James Levin, a top fundraiser for both President Clinton and Senator Clinton, as well as Senator Clinton and Smith, Paul alleged President Clinton, through his agents, falsely promised he would work for Paul's companies, Stan Lee Media, Inc. and Mondo English, Inc., as a global goodwill ambassador after the President left office in exchange, in part, for Paul's agreement to serve as executive producer and to underwrite certain costs of the Hollywood Gala Salute to President Clinton (the Hollywood Tribute), an event to raise money for the Democratic Party and Senator Clinton's senatorial campaign. Paul alleged he had previously co-hosted other events for the Democratic Party and Senator Clinton's campaign in order to gain access to President Clinton.

Paul alleged he had hired Smith, a friend of the Clintons, to produce the concert portion of the Hollywood Tribute, purportedly at the Clintons' request made through Rosen. Smith had produced President Clinton's first inaugural ball and was producing the Democratic National Convention to be held in August 2000. At Paul's initial meeting

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[1] Statutory references are to the Code of Civil Procedure.

[2] This summary of the factual and procedural background of Paul's lawsuit relies in substantial part on our prior opinions in the case, *Paul v. Clinton* (Oct. 18, 2005, B178077 [nonpub. opn.] (*Paul I*) and *Paul v. Clinton* (Oct. 16, 2007, B191066 [nonpub. opn.] (*Paul II*).

with Smith, Smith offered to produce the concert and to provide an edited videotape of it to be completed within one week of the event for a single all-inclusive fee of $850,000. After Paul protested to Rosen the amount demanded by Smith for this work was excessive, Rosen represented Smith was a close personal friend of Senator Clinton's and assured Paul the senator would intervene to have Smith lower his fee. The following day Rosen allegedly told Paul Senator Clinton had spoken with Smith and as a result Smith had agreed to reduce his fee by $50,000.

After confirming the fee arrangement with Smith's attorney, Paul agreed to use Smith and began making payments. However, a few days prior to the Hollywood Tribute, Smith demanded an additional $75,000 as a "personal production fee," threatening to quit if he did not receive payment. When Paul sought Rosen's advice concerning Smith's demand, Rosen told him Senator Clinton would not intervene and to pay the additional fee inasmuch as Smith was vital to the success of the event. Paul did so.

The Hollywood Tribute was held on August 12, 2000 and raised almost $1.5 million for Senator Clinton's campaign. Although Paul had initially agreed to underwrite $525,000 in costs, he alleged he was coerced into funding approximately $1.9 million after costs escalated and another contributor who had pledged $525,000 failed to make any payment. According to Paul's allegations, Rosen and others had threatened to cancel the event and blame Paul for the embarrassment the Clintons would suffer and told him failure to continue underwriting the event would cause him to lose the funds he had already expended and destroy any opportunity to work with the President.

On August 15, 2000, three days after the Hollywood Tribute, a newspaper reported Paul had served three years in prison for felony convictions in the 1970's. A spokesperson for Senator Clinton and her campaign was quoted as denying Paul had given or raised any money for the campaign. In another article two days later a spokesperson for Senator Clinton acknowledged Paul had contributed money to Senator Clinton's campaign, but represented the contribution was only $2,000 and had been

returned. Despite the articles, Paul alleged he received repeated assurances from the Clintons and their agents the President would begin working with Paul after he left office.

In late October 2000 Levin repeatedly called Paul to obtain the videotape of the concert, stating the Clintons were anxious to receive it so they could send out copies as Christmas gifts and use it to assist in fundraising for the Clinton Presidential Library. Smith, however, failed to provide the edited videotape of the concert as previously agreed. Paul learned Smith was withholding the unedited masters of the videotape until Paul reimbursed him for additional expenses allegedly incurred in producing the concert. Levin encouraged Paul to pay whatever expenses were necessary to obtain the videotape. Paul retained a lawyer, negotiated the demanded expenses, and eventually agreed to pay Smith $6,100 in exchange for an unedited videotape of the concert.

After Senator Clinton was elected in November 2000, the Clintons ceased all contact with Paul, save for a generic Christmas card. In December 2000 Stan Lee Media began suffering financial setbacks that ultimately led to it filing for bankruptcy. Paul was never contacted by President Clinton about working with him or with Mondo English, Inc., which had continued operating.

2. *The First and Second Amended Complaints*

After demurrers were sustained to his complaint filed in October 2003,[3] on March 1, 2004 Paul filed a first amended complaint asserting 17 causes of action against President Clinton, Senator Clinton, Rosen, Levin, Smith and others. The causes of action against Smith for fraud, negligent representation and unfair competition were predicated on Paul's claim Smith had falsely represented he would reduce his fee by $50,000 with the intention of eliciting additional money from him in the future.

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[3] Paul's initial complaint, filed in June 2001, did not name Smith. That complaint was dismissed under the fugitive disbarment doctrine while Paul was in Brazil. Paul filed essentially the same complaint on October 14, 2003, adding Smith as a defendant, after Paul had been extradited to the United States to stand trial on federal securities charges in connection with the collapse of his company, Stan Lee Media, Inc.

On August 8, 2008, following a series of rulings by the trial court largely in favor of various defendants on their demurrers and special motions to strike pursuant to section 425.16, as well as two nonpublished decisions by this court reviewing several of those rulings (*Paul I* and *Paul II*), Paul filed a second amended complaint naming only President Clinton, Levin and Smith as defendants. Smith is named as the sole defendant in the fourth cause of action for fraud and deceit and fifth cause of action for negligent misrepresentation. The allegations regarding Smith's misrepresentations are essentially unchanged from those in the first amended complaint.

The trial court sustained President Clinton's and Levin's demurrers to the first three causes of action (for intentional interference with prospective economic advantage, intentional interference with performance of contract by third person and civil conspiracy) primarily on statute of limitations grounds. The court also sustained Smith's demurrer to the fifth cause of action for negligent misrepresentation on the ground it was barred by the governing two-year statute of limitations (§ 339), but overruled his demurrer to the fourth cause of action for fraud, which has a three-year limitations period (§ 338, subd. (d)), concluding "the question of whether plaintiff should have discovered the alleged deceit is for the trier of fact, not the court at the pleading state of a case."

3. *Smith's Special Motion To Strike*

Based in significant part on the analysis in *Paul I* and *Paul II* in which this court held the claims against Rosen, Senator Clinton and Clinton for Senate as alleged in the first amended complaint arose from constitutionally protected campaign fundraising activity, Smith moved to strike the fourth cause of action under section 425.16. The trial court denied the motion, finding Smith's activities, unlike those of the other defendants, were not entitled to protection under section 425.16: "Although there was a political event going on that involved important first amendment rights, Smith was not involved in those activities anymore than the electrician who set up the lights would have been. Smith was providing a service and the allegation is that he did that service fraudulently. Accordingly, his activities are not entitled to the special protection accorded by . . . section 425.16."

DISCUSSION

1. *Section 425.16: The Anti-SLAPP Statute*[4]

Section 425.16 provides, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)[5]

In ruling on a motion under section 425.16, the trial court engages in a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating

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[4] SLAPP is an acronym for "strategic lawsuit against public participation." (*Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 8, fn. 1.)

[5] Under the statute an "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

the facts upon which the liability or defense is based.'" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

In terms of the so-called threshold issue, the moving party's burden is to show "the challenged cause of action arises from protected activity." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056; *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 616, fn. 10.) "[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e) . . . .'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "If the defendant does not demonstrate this initial prong, the court should deny the anti-SLAPP motion and need not address the second step." (*Hylton v. Frank Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1271 (*Hylton*).)

If the defendant establishes the statute applies, the burden shifts to the plaintiff to demonstrate a "probability" of prevailing on the claim. (*Equilon Enterprises v. Consumer Cause, Inc., supra,* 29 Cal.4th at p. 67.) In deciding the question of potential merit, the trial court properly considers the pleadings and evidentiary submissions of both the plaintiff and the defendant, but may not weigh the credibility or comparative strength of any competing evidence. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714; *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) The question is whether the plaintiff presented evidence in opposition to the defendant's motion that, if believed by the trier of fact, is sufficient to support a judgment in the plaintiff's favor. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) Nonetheless, the court should grant the motion "'if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.'" (*Taus,* at p. 714; *Wilson,* at p. 821; *Zamos,* at p. 965.)

"'The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue.'" (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928.) We review the trial court's rulings independently under a de novo standard of review. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325; *Rusheen v. Cohen, supra,* 37 Cal.4th at p. 1055.)

2. *The Trial Court Properly Denied Smith's Special Motion To Strike*

Relying in large part on the principle that section 425.16 should be broadly construed (see generally § 425.16, subd. (a)), Smith contends his conduct was protected "because the concert he prepared and directed was part of a political fundraiser for Hillary Clinton," which "included not only numerous musical performances but also political statements by persons in the entertainment community." Smith also argues, just as we determined in *Paul I, supra*, B178077 that section 425.16 was applicable to Paul's claim against Rosen for allegedly conspiring with Smith in Smith's scheme to obtain a greater fee from Paul, so should we conclude it is applicable to the underlying fraud claim against Smith himself. Smith in particular emphasizes our statement in *Paul I,* [at page 11] that "Smith's representations also related to the campaign fundraising event."

To obtain the protection of section 425.16, even broadly construed, it is not enough that protected First Amendment activity swirl in the background. "[A] defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant. [Citation.] . . . [I]t is the *principal thrust or gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation], and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute." (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.) "Accordingly, we focus on the specific nature of the challenged protected conduct, rather than generalities that might be abstracted from it." (*Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1279; *Hylton, supra*, 177 Cal.App.4th at p. 1272 ["We assess the principal thrust by identifying '[t]he

allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.' [Citation.] If the core injury-producing conduct upon which the plaintiff's claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute."].)

To be sure, significant portions of Paul's complaint contain allegations describing protected activity from which a number of his claims against Senator Clinton and Rosen arose—claims we held were properly dismissed pursuant to section 425.16 in *Paul I* and *Paul II*. However, Paul's fraud claim against Smith must be analyzed independently of his claims against other defendants to determine whether it arises from protected speech or petitioning activity within the meaning of section 425.16. (Cf. *Midland Pacific Building Corp. v. King* (2007) 157 Cal.App.4th 264, 275 ["cause of action for fraud requires a different analysis than the causes of action based on breach of contract"].) Focusing on just the fraud claim regarding alleged misrepresentations by Smith about his fee for producing the concert and creating an edited videotape, it is clear it does not arise from protected First Amendment activity.

As discussed, the gravamen of Paul's fraud claim is that Smith falsely stated he would reduce his fee for producing the concert and that, at the time of the representation, he intended to increase the fee at a later date when Paul would be forced by circumstances and timing to acquiesce. Although the concert portion of the event Smith was hired to produce no doubt involved protected First Amendment activity on an issue of public interest because of the Hollywood Tribute's political nature and purpose to raise campaign funds, the allegedly wrongful and injury-producing conduct occurred during the private negotiation of Smith's retention, well before any exercise of First Amendment rights. The negotiations themselves do not rest on protected speech within the scope of section 425.16.[6]

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[6] Although private contract negotiations might, in a but-for causation sense, be viewed as an "act in furtherance of a person's right to petition or free speech" (§ 425.16, subd. (e)), section 425.16 is not properly stretched to encompass a claim merely because

Smith's special motion to strike is closely analogous to the section 425.16 motion at issue in *Hylton*, *supra*, 177 Cal.App.4th 1264. Hylton sued his former attorney, alleging the attorney had breached his fiduciary duty to him by "concoct[ing] a scheme to extract an excessive fee." (*Id.* at p. 1269.) The scheme allegedly included making false statements to Hylton, who had sought the attorney's advice in connection with a wrongful termination action, that legal action was necessary to protect Hylton's ownership in company stock he had received pursuant to a founder stock purchase agreement; manufacturing a dispute with the company over Hylton's stock ownership; and inducing Hylton to settle the case, thus triggering the contingency fee that was based on the amount of stock Hylton retained. (*Ibid.*) The attorney filed a special motion to strike, arguing section 425.16 was applicable because the action was based on the attorney's protected petitioning activity: "[T]he complaint sought to pursue claims that arose from statements made before a judicial proceeding or in connection with an issue under consideration by a judicial body, and therefore the underlying conduct constituted protected petitioning activity within the meaning of the anti-SLAPP statute." (*Hylton*, at pp. 1269-1270.)

The Court of Appeal affirmed the trial court's denial of the special motion to strike, holding, "Hylton's claims allude to [the attorney's] petitioning activity, but the gravamen of the claim rests on the alleged violation of [the attorney's] fiduciary obligations to Hylton by giving Hylton false advice to induce him to pay an excessive fee to [the attorney]." (*Hylton*, *supra*, 177 Cal.App.4th at p. 1274.) "If the core injury-

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the conduct from which it arises is in a chain of activity that ultimately leads to the exercise of a person's First Amendment rights. (See *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 729-730 ["'[a]lthough a party's litigation-related activities constitute "act[s] in furtherance of a person's right of petition or free speech," it does not follow that any claims associated with those activities are subject to the anti-SLAPP statute'"]; cf. *Midland Pacific Building Corp. v. King*, *supra*, 157 Cal.App.4th at p. 275 [in action by developer against seller of land, breach of contract cause of action arose from protected activity but fraud claim did not; "the representation that forms the basis of the fraud cause of action was made between private parties to induce one of the parties to consent to a change in the terms of a contract"].)

producing conduct upon which the plaintiff's claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute." (*Id.* at p. 1272.) Similarly, in the case at bar, Paul's claims include allegations relating to First Amendment activity, but the essence of his claim against Smith is that Smith fraudulently promised to reduce his fee in contract negotiations that were separate from Smith's exercise of First Amendment rights as a producer of a portion of the Hollywood Tribute fundraising event. (See also *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 730-732 [client's claims against former attorney for breach of fiduciary duty or malpractice does not fall within scope of § 425.16 merely because claim followed or was associated with protected petitioning activity by the attorney on the client's behalf]; *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1187-1190 [client's claim against former attorney for violating rule 3-310 of Rules of Professional Conduct not within § 425.16 even though it occurred in the context of litigation].)

Our conclusion that Paul's claim of fraud based on Smith's alleged misrepresentations does not fall within the ambit of section 425.16 is not inconsistent with the holdings in *Paul I* and *Paul II* that Paul's claims (in the fourteenth cause of action of the first amended complaint) that Senator Clinton and Rosen had conspired with Smith in the fraud were properly subject to a special motion to strike. Smith and Rosen had two entirely different roles in the overall scheme of wrongdoing alleged by Paul, which primarily focused on Paul's theory he had been "duped into making campaign contributions and organizing and funding a major fund raising event." (*Paul I, supra*, B178077 [at p. 11].) Rosen, as the national fundraiser for Senator Clinton's campaign, was a central figure in the plot, sued for "representations he or others made relating to the solicitation of political contributions and the organization of a fundraising event, acts which constituted constitutionally protected speech and conduct." (*Ibid*.) Smith, on the other hand, was allegedly involved only in the tangential fraud perpetrated with the sole goal of increasing his producer's fee—a matter wholly unrelated to the solicitation of

political contributions, the organization of the fundraising event or the production of the event itself.

Similarly, as to Paul's conspiracy claims against Senator Clinton, all of her allegedly wrongful actions were "to to ensure the Hollywood Tribute successfully proceeded—whether it was encouraging Paul to produce the event so he could enhance his chance of entering into a business relationship with President Clinton or helping Smith convince Paul to hire him at a fee Smith never intended to honor." As a result, we concluded, Paul's fourteenth cause of action against Senator Clinton "'arise[s] from' [her] involvement in the campaign fundraising event, protected First Amendment activity." Smith's allegedly wrongful conduct, in contrast, was limited to ensuring his own pecuniary interest was maximized. While his alleged misrepresentations may have related to the campaign event in a broad sense, it was his limited role that distinguishes his circumstances from Rosen's and Senator Clinton's and thus warrants denial of his special motion to strike.

DISPOSITION

The order denying the section 425.16 special motion to strike is affirmed. Paul is to recover his costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.